

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

OLANDER DONTREYL CALBERT,

Defendant-Appellant.

UNPUBLISHED

January 27, 2004

No. 243875

Saginaw Circuit Court

LC No. 01-019528-FC

Before: O’Connell, P.J., and Wilder and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of first-degree felony murder, MCL 750.316(1)(b); armed robbery, MCL 750.529; carrying a concealed weapon, MCL 750.227(2); and two counts of felony-firearm, MCL 750.227b(1). He was sentenced to concurrent sentences of 2 years each for the felony-firearm counts, consecutive to concurrent sentences of life imprisonment for felony murder, 10 to 20 years for armed robbery, and 2 to 5 years for carrying a concealed weapon. We affirm.

Defendant first claims on appeal that because defense counsel failed to impeach a prosecution witness with his prior conviction for making a false police report, he was denied his constitutional right to effective assistance of counsel. Defendant argues that the impeachment of the witness would have negatively reflected on the witness’ credibility and substantially benefited defendant’s case. We disagree. Because no evidentiary hearing was held in this case, defendant’s claim is considered only to the extent that counsel’s claimed mistakes are apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

In reviewing claims of ineffective assistance of counsel, Michigan courts use the standard set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Pickens*, 446 Mich 298, 302-303, 318; 521 NW2d 797 (1994). Under the *Strickland* test, a defendant must show: (1) that counsel’s performance was deficient to the extent that it fell below an objective standard of reasonableness under prevailing professional norms; and (2) that counsel’s deficient performance so prejudiced the defendant that it deprived him of a fair trial; that is, there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Id.* at 303; *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003); *Strickland, supra* at 694.

In proving the *Strickland* elements, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Riley, supra*. Defendant argues that there was no conceivable strategic reason for defense counsel not to impeach one of the prosecution's witnesses with his prior conviction. See MRE 609(a)(1). However, "[d]ecisions concerning which witnesses to call, what evidence to present, or the questioning of witnesses are considered part of trial strategy." *People v Bass (On Rehearing)*, 223 Mich App 241, 252; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998). Further, defense counsel's strategy will not be second-guessed. *People v Carr*, 141 Mich App 442, 452; 367 NW2d 407 (1985). Thus, "[i]n order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the defendant." *Bass, supra* at 253, citing *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990).

The record fails to show either that Roby was actually convicted of making a false report or that defense counsel knew about the alleged conviction; thus, defendant's claim that he was denied effective assistance of counsel because his attorney failed to investigate Roby's criminal history or impeach him with his prior conviction is not supported by the evidence. See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Furthermore, defense counsel made a strategic decision to argue to the jury that Roby's credibility was destroyed by his admission he lied under oath in his affidavit. We do not second-guess trial counsel concerning matters of trial strategy. *Pickens, supra* at 330.

Defendant next argues on appeal that the trial judge plainly erred by not properly instructing the jury on the intent element of felony murder or that, in the alternative, defense counsel was ineffective for failing to request the instruction. We disagree.

Objections to jury instructions must be timely; before the jury retires to consider the verdict, the objecting party must object on the record by specifically stating the matter being objected to and the ground for the objection. *Tringali v Lal*, 164 Mich App 299, 306; 416 NW2d 117 (1987); MCR 2.516(C). Defendant did not properly object below; thus, our review is limited to plain error affecting defendant's substantial rights. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). To avoid forfeiture under the plain error rule, the defendant bears the burden to show that: 1) an error occurred, 2) the error was plain, i.e. clear or obvious, 3) and the plain error prejudiced substantial rights, i.e. that the error affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

We generally review jury instructions in their entirety, i.e. read as a whole rather than extracted piecemeal, to determine whether the trial court committed error requiring reversal. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993); *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975); *People v Harris*, 190 Mich App 652, 664; 476 NW2d 767 (1991). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991). Error does not result from the omission of an instruction if the charge as a whole covers the substance

of the omitted instruction. *Harris, supra* at 664. A trial court need not give requested instructions that the facts do not warrant. *People v Dalton*, 155 Mich App 591, 599; 400 NW2d 689 (1986).

Defendant argues that when read together with the instructions for armed robbery, the felony murder instructions could have permitted the jury to improperly find defendant guilty of felony murder even if it determined that he did not form the intent to steal until *after* the murder. See *People v Brannon*, 194 Mich App 121, 125; 486 NW2d 83 (1992).

We disagree. The trial court's instructions were essentially verbatim to the Michigan Criminal Jury Instructions, and although those standard instructions are not officially sanctioned by our Supreme Court, *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985), they are useful in determining the sufficiency of the instructions given. We find that the instructions as given were sufficient to convey to the jury that defendant must have held the intent to steal at time of the murder in order to be convicted of felony murder. See *People v Goss*, 446 Mich 587, 638 n 22; 521 NW2d 312 (1994) (Riley, J., dissenting).

Defendant argues in the alternative that even if this Court finds that the trial court did not plainly err in instructing the jury on the intent element of felony murder, defense counsel was ineffective for not requesting a clarified instruction. We reject this argument because it was clear that defense counsel's strategy was to seek an acquittal by reason of self-defense. A request for a clarification of the intent element of the felony-murder instruction would have been inconsistent with that strategy by suggesting that a conviction for second-degree murder was an acceptable alternative. Importantly, defendant does not argue that defense counsel was ineffective for failing to argue second-degree murder. Instead, defendant claims that defense counsel was ineffective only for failing to seek an instruction that would have advocated that position.

As stated by our Supreme Court:

Every criminal defense attorney must make strategic and tactical decisions that affect the defense undertaken at trial. Most criminal defense attorneys have a variety of options from which to choose that affect, if not determine, how the jury understands and comprehends the case. . . . The role of defense counsel is to choose the best defense for the defendant under the circumstances. . . . Defense counsel must be afforded "broad discretion" in the handling of cases, which often results in "taking the calculated risks which still do sometimes, at least, pluck legal victory out of legal defeat." [*Pickens, supra* at 324-325, quoting *People v Lundberg*, 364 Mich 596, 600, 601; 111 NW2d 809 (1961).]

We adopt this well-known principle and decline defendant's invitation to second-guess counsel's strategic decisions. See *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001); *People v Rockey*, 237 Mich App 74, 76, 77; 601 NW2d 887 (1999).

There was no plain error in the trial court's jury instructions, and defense counsel was not ineffective for failing to seek clarification on an instruction that would be inconsistent with the defense strategy.

Affirmed.

/s/ Peter D. O'Connell

/s/ Kurtis T. Wilder

/s/ Christopher M. Murray